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8 UNITED STATES BANKRUPTCY COURT
9 FOR THE DISTRICT OF OREGON

10 In Re:) Bankruptcy Case
11 DAVID RAE BARTLETT and) No. 07-63647-fra13
12 LYNN MARIE BARTLETT,)
13 _____) MEMORANDUM OPINION
Debtors.)

14 Debtors have failed to strictly comply with the pre-petition
15 counseling requirements imposed by 11 U.S.C. § 109(h). They seek an
16 order waiving the requirement on the grounds that they have moved
17 promptly to remedy the defect, and that dismissing the case would
18 prejudice creditors and result in unnecessary administrative costs. The
19 Court finds that the Debtors have not established grounds for relief from
20 the provisions of § 109(h), and that the case should be dismissed.

21 I. FACTS

22 Debtors filed their petition for relief under Chapter 13 of the
23 Bankruptcy Code on December 29, 2007. Accompanying their petition were
24 Certificates of Credit Counseling Briefing attesting that each received
25 the briefing required by Code § 109(h) on June 27, 2007 - 185 days prior
26 to the date the petition was filed.

1 On January 2, 2008, the Court issued an order and notice
2 directing the Debtors to file either an amended certificate reflecting
3 receipt of a briefing within 180 days prior to the filing date, a motion
4 for an extension of time to file, or an exemption from the briefing
5 requirement altogether. On January 3, the Debtors filed their motion to
6 extend the time to file a certificate, using the Court's standard Form
7 100.3. The motion states in part that:

8 We completed the required credit counseling briefing
9 on June 27, 2007, and originally planned to sign and
10 file our bankruptcy case on November 28, 2007.
11 However, our vehicle was repossessed the night before
12 our scheduled appointment to sign and file the
13 bankruptcy case. This delayed our filing for one
14 month. We signed the bankruptcy petition on December
15 28, 2007 - within 184 days of completing the briefing
16 - and the case was filed on the 185th day after
17 completing the briefing. We completed a second
18 counseling session on January 2, 2008, which would
19 allow us to immediately file a new case if this case
20 is dismissed. Dismissing this case will only
21 prejudice creditors and result in the unnecessary
22 administrative costs of filing a new case.

23 II. STATUTORY REQUIREMENTS

24 Code § 109(h)1) provides that:

25 Subject to paragraphs 2 and 3, and notwithstanding any
26 other provision of this section, an individual may not
be a debtor under this title unless such individual
has, *during the 180-day period preceding the date of
filing of the petition by such individual*, received
from an approved nonprofit budget and credit
counseling agency described in § 111(a) an individual
or group briefing (including a briefing conducted by
telephone or on the internet) that outlined the
opportunities for available credit counseling and
assisted such individual in performing a related
budget analysis. [Emphasis added.]

27 A debtor may commence a case under the Code notwithstanding
28 this requirement by submitting a certification which describes exigent

1 circumstances that merit a waiver of the requirements described above,
2 and which states that the debtor requested services from an approved
3 counseling agency but was unable to obtain the services during the five
4 day period beginning on the date on which the debtor made the request. If
5 the certification is satisfactory to the court, it may, for up to 30
6 days, waive the filing requirement. Code § 109(h)(3)(A).

7 III. DISCUSSION

8 The Debtors' motion does not assert that they were unable to
9 obtain counseling services within five days of their request for such
10 service. More importantly, the motion does not, in the Court's opinion,
11 describe "exigent circumstances" which justify commencement of the case
12 after the counseling certificate had expired, and without first
13 undertaking a new counseling session. It may be - as the sequence of
14 events here certainly suggests - that the expiration of the original
15 certificate was simply overlooked. Whatever the reason, the Debtors are
16 ineligible under § 109(h) because they failed to obtain the counseling
17 within the 180 days prior to their petition, and failed to qualify for a
18 post-petition extension of time. That Debtors did in fact act to remedy
19 the problem by obtaining counseling after receiving notice of the defect
20 does not, by itself, satisfy the terms of § 109(h)(3).

21 The Debtors argue that, notwithstanding their lack of strict
22 compliance, the case should not be dismissed in light of the potential
23 for prejudice to creditors and the unnecessary administrative costs
24 entailed in filing a new case. In effect, the Debtors seek an equitable
25 exception to strict compliance with the terms of § 109(h).

26 Bankruptcy courts have been varied in their responses to this

1 issue. The "vast majority" of courts considering the issue have strictly
2 construed the statute's time requirements. In re Ruckdaschel, 364 B.R.
3 724, 729 (Bankr. D. Id. 2007). Courts adhering to this view have
4 dismissed cases filed by debtors who are deemed ineligible under
5 § 109(h). Other courts have held that the provisions of § 109(h) are not
6 jurisdictional, and that dismissal is not mandated when debtors are
7 ineligible. In re Manalad, 360 B.R. 288 (Bankr. C.D. Ca. 2007); In re
8 Enloe, 373 B.R. 123 (Bankr. D. Co. 2007); In re Hess, 347 B.R. 489
9 (Bankr. D. Vt. 2006).

10 Another eligibility requirement in the Code is to be found at
11 § 109(g): this section provides that an individual "may not be a debtor
12 under this title" if the individual has been the debtor in a case within
13 the 180 days preceding the petition if the prior case was dismissed for
14 failure to comply with a court order, or voluntarily after a motion for
15 relief from the automatic stay had been filed. In In re Luna, 122 B.R.
16 575 (9th Cir. BAP 1991), the Bankruptcy Appellate Panel for the Ninth
17 Circuit held that § 109(g) was not jurisdictional in nature, and that
18 mechanical application of this section was inappropriate where doing so
19 would produce an illogical, unjust, or capricious result. Since
20 §§ 109(g) and (h) are similar in language and intent, it stands to reason
21 that the standard set out in Luna is applicable to § 109(h).

22 Dismissal in this case, while inconvenient and expensive, is
23 neither illogical nor unjust. The statute imposes a clearly defined
24 requirement: that debtors must undergo counseling prior, but not more
25 than 180 days prior, to commencement of their bankruptcy cases. This is
26 part of a consistent statutory scheme designed to encourage (if not

1 force) prospective debtors to explore alternatives before commencing a
2 bankruptcy case. Debtors here failed to comply with that requirement and
3 offer no substantial justification for that failure. The result is that
4 they will have to file again: this may require payment of a new filing
5 fee and, perhaps, the need to seek an extension of the automatic stay
6 under Code § 362. Unlike § 109, relief from these provisions is provided
7 for in the Code, and does not require a resort to equity. The filing fee
8 may be waived if the Debtors qualify, Fed.R.Bankr.P. 1006(c), and the
9 automatic stay may be extended, 11 U.S.C. §362(c)(3)(B). Neither the
10 inconvenience nor the expense attendant to dismissal are insurmountable.
11 The existence of these remedies in the statutory scheme precludes ready
12 application of equitable remedies.

13 Debtors point out that neither the Trustee nor any other
14 interested party has sought dismissal of the case. In some contexts this
15 might mean that the case would be allowed to continue. See e.g. In re
16 Duffus, 339 B.R. 746 (Bankr. D.Or. 2006). However, provisions such as
17 the one at issue in Duffus merely set out a remedy -dismissal- which may
18 or may not be sought in a given case. Under §109(h), a debtor who has
19 not complied with the briefing requirement is not entitled to any relief
20 under Title 11, including the benefit of the automatic stay or any
21 discharge. Absent circumstances satisfying the Luna criteria, no further
22 relief may be extended.

23 IV. CONCLUSION

24 Code § 109(h) should be strictly applied according to its
25 terms. Where debtors are found to be ineligible under this section the
26 case should be dismissed, unless to do so would be illogical, unjust or

1 capricious under the circumstances. That is not the case here, and the
2 case must be dismissed.

3 The Court recognizes that substantial inconvenience to the
4 parties may result if particularly aggressive creditors move to seize
5 assets between the time a case is dismissed and a new one is filed. In
6 most instances such seizures would be subject to avoidance as
7 preferences. In order to avoid that problem, the order dismissing the
8 case will not take effect for 10 days.

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10 FRANK R. ALLEY, III
11 Bankruptcy Judge
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